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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DESHAWN GREEN, Defendant and Appellant.	E039947 (Super.Ct.No. FVI022417) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Kristine A. Gutierrez, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Michael Deshawn Green appeals from his conviction of attempted willful, deliberate, premeditated murder (Pen. Code,[1] §§ 664, subd. (a), 187, subd. (a) -- count 1),[2] assault with a firearm (§ 245, subd. (a)(2) -- count 2), exhibiting a deadly weapon to an officer to resist arrest (§ 417.8 -- count 5), and two counts of resisting an executive officer (§ 69) -- counts 6 and 7) along with firearm use enhancements (§§ 12022.5, subds. (a) & (d), 12022.53, subds. (b) & (c)) as to counts 1 and 2.

Defendant contends the trial court committed prejudicial error in (1) denying defendant's motion for mistrial after testimony was elicited that the victim was fearful of identifying defendant because defendant was a gang member; (2) admitting evidence that defendant had marijuana packaged for sale in his possession when he was arrested; (3) failing to instruct the jury sua sponte that resisting an officer was a specific intent crime; (4) failing to instruct the jury on section 148, subdivision (a)(1) as a lesser included offense to resisting an executive officer; and (5) denying defendant's motion to release juror identifying information to enable defendant to investigate juror misconduct. Defendant also argues that the abstract of judgment must be corrected. The People concede that the abstract of judgment should be corrected. We find no other prejudicial error, and we affirm.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] The charges in the first amended information were renumbered after the trial court dismissed two counts, and defendant was found not guilty in counts 3 and 4. The count numbers used in this opinion correspond to the renumbered counts.

II. FACTS AND PROCEDURAL BACKGROUND

In the evening of August 20, 2005, Javier Valencia pulled into a shopping center parking lot in Victorville to check his tire pressure. He was confronted by a group of five men, including defendant. One of the men said, "[F]uck that, esse," to Valencia, and another asked Valencia if he had a problem. Valencia said he did not, and he got back into his car. Defendant stood in front of the car and fired five or six shots at Valencia. Valencia "popped [his] trunk," and ran back and hid behind his trunk until the assailants ran away. Valencia saw the shooter run up some stairs in the shopping area and saw the other men run across the street to hotels.

Valencia drove away and called 911. He described the shooter as an African-American man 17 or 18 years old, wearing a red shirt and shorts, and wearing his hair in corn rows. While Valencia was on the telephone with the 911 operator, he saw the same men speed by him in an older model white car with a brownish roof. He described the car to the 911 operator.

Deputies responding to the call spotted a car matching the description Valencia had provided. The deputies followed the car until it stopped at a gas station. The deputies then began to conduct a felony stop, which involved drawing their handguns and ordering the people out of the car. Even before the officers gave any instructions, however, defendant jumped out of the left rear passenger door. Defendant ran toward the deputies, putting his hand on a handgun in his waistband. A deputy ordered him to stop and put his hands in the air, but defendant ran away from the officers and into a field. The other four men also got out of the car.

Deputy Brent Wood began to chase defendant. He ordered defendant to stop and get on the ground. Defendant took the gun from his waistband, extended his arm, and began to turn towards Deputy Wood. Deputy Wood twice ordered defendant to drop the gun, but defendant did not comply, and Deputy Wood shot at defendant. Defendant put the gun back in his waistband and continued running. Deputy Wood again ordered him to drop the gun and get on the ground. After defendant ran another 30 or 40 feet, he pulled the gun out from his waistband and again started to turn towards Deputy Wood. Deputy Wood yelled, "[D]rop the gun" again, and when defendant did not do so, Deputy Wood fired several more shots at defendant. Defendant put the gun back in his waistband again and continued to run.

Deputy Wood lost sight of defendant. A perimeter was set up, and officers found defendant hiding under a bush. Defendant refused to come out when ordered to do so, and he kept his hands under his body and physically resisted the officers when they tried to pull his hands out to handcuff him. Working together, four officers eventually subdued defendant and handcuffed him. Officers found a semiautomatic pistol in the field 115 feet away from defendant's position.

Defendant had suffered a gunshot wound to the chest. When defendant was searched for identification, five or six baggies of marijuana were found in his shorts pocket. A deputy testified that in his opinion, based on the quantity and the manner of packaging, the marijuana was possessed for sales. Defendant was transported to the hospital.

Seven fired cartridges were recovered from the parking lot where Valencia's car had been shot at. Valencia's car contained several bullet holes. Five of the seven fired cartridges and two bullets recovered from Valencia's car were determined to have been fired from the gun found near defendant at the time of his arrest. Defendant's hands tested positive for gunshot residue (GSR) in two separate tests.

On the night of the shooting, Valencia identified the vehicle in which defendant had been a passenger. Valencia identified defendant as the shooter from a photographic lineup on September 14 and from a group of photographs on November 7, 2005. He also identified photographs of other men as the driver and as the man who had first confronted him. At trial, however, Valencia testified he was unable to identify defendant as the shooter. Evidence showed Valencia did not want to identify defendant in court because he was afraid, based on his belief that defendant was a gang member.

The jury found defendant guilty of attempted willful, deliberate, premeditated murder (§§ 664, subd. (a), 187, subd. (a) -- count 1), assault with a firearm (§ 245, subd. (a)(2) -- count 2), exhibiting a deadly weapon to an officer to resist arrest (§ 417.8 -- count 5), and two counts of resisting an executive officer (§ 69 -- counts 6 and 7). The jury found true the allegations as to counts 1 and 2 that defendant used a firearm (§§ 12022.5, subds. (a) & (d), 12022.53, subds. (b) & (c)).

The trial court sentenced defendant to life plus 23 years 8 months in prison, including a sentence of life on count 1 plus 20 years for the firearm enhancement under section 12022.53, subdivision (c); three years on count 5; and eight months on count 7. Sentences on other counts and enhancements were stayed.

III. DISCUSSION

A. Denial of Motion for Mistrial

Defendant contends the trial court committed reversible error when it denied defendant's motion for a mistrial after testimony was elicited that Valencia feared identifying defendant at trial because defendant was a gang member.

1. Background

Valencia twice identified photographs of defendant as the shooter before trial. However, Valencia did not identify defendant in court as the shooter. Deputy James Wiebeld, who conducted the photographic lineups, testified that Valencia had said he did not want to testify at trial because he knew defendant and his confederates were gang members. Defense counsel objected on the ground of lack of foundation and moved to strike the testimony. Instead, the trial court instructed the jury it could not consider as true Valencia's statement that defendant was a gang member.[3]

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[3] The trial court instructed the jury as follows: "Certain evidence was admitted for a limited purpose. At the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted. [¶] Now, what evidence is it and how is it limited? [¶] I am going to allow the testimony from Detective Wiebeld about the statements made to him by Mr. Valencia, and I will tell you frankly, this is the first that I heard the statement. [¶] You cannot take Mr. Valencia's statement as reported so far by Detective [Wiebeld] that Mr. Green is a gang member as true. There is no testimony in this court. There is no evidence before the jury other than that which was just mentioned by Detective Wiebeld to conclude that Mr. Green is the member of a gang. [¶] Again, I am not going to allow you to accept as true the statement that Mr. [Green] is a member of a gang, but I am going to allow you to hear the statement, which you have already heard, for the limited purpose of understanding what Mr. Valencia believes in terms of his state of mind as it relates to giving testimony in this court."

After a break, defense counsel moved for a mistrial, arguing that she had received no discovery indicating Valencia had made a statement about defendant being a gang member and that the evidence was highly prejudicial and could not be cured with a limiting instruction. Counsel also stated that if she had had prior notice, she would have moved in limine to exclude the evidence. The prosecutor stated he had called Detective Wiebeld to testify that Valencia was afraid, but the prosecutor had not known that the reason for the fear was Valencia's belief that defendant was a gang member. The prosecutor further asked the court to allow newly discovered evidence showing that the assault on Valencia was a gang crime. The trial court warned defendant that if a mistrial were granted, the prosecution would be able to charge a gang enhancement. Defense counsel stated she had no reason to believe defendant was a gang member, so she was still asking for a mistrial. The court expressed its belief that defendant should have been notified earlier about Valencia's statement. The court found, however, that defendant's motion for a mistrial was untimely because the matter had been discussed when the testimony was given, and counsel had been given the opportunity to make any comments. The court found the limiting instruction was sufficient and denied the motion, but instructed the prosecution not to present any additional evidence that this was a gang-related crime. The court later gave another general limiting instruction.[4]

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[4] The instruction provided, "Certain evidence was admitted for a limited purpose. At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

2. Standard of Review

"A trial court should grant a motion for mistrial 'only when "'a party's chances of receiving a fair trial have been irreparably damaged'"' [citation], that is, if it is 'apprised of prejudice that it judges incurable by admonition or instruction' [citation]. 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.] Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion. [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 573.) When the trial court admonishes the jury that certain testimony may be used only for a limited purpose, "[w]e presume the jury followed the court's instructions. [Citations.]" (*Id.* at p. 574.)

3. Analysis

Courts have acknowledged that evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the crimes charged. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193.) Here, though, the evidence that Valencia was afraid to testify because he believed defendant was a gang member was relevant to Valencia's credibility in testifying, particularly because he failed to identify defendant at trial despite having selected his photograph twice before from photographic lineups. (See *People v. Williams*, *supra*, 16 Cal.4th at pp. 209-211 [holding that the trial court had properly denied a motion for mistrial when the witness's testimony that she had been afraid for her life at the preliminary hearing was relevant to the issue of her credibility because it

explained inconsistencies between her testimony at the preliminary hearing and at trial].) The trial court was in the best position to gauge the effect of the evidence on the jury. (*People v. Williams* (2006) 40 Cal.4th 287, 323; see also *People v. Avila*, *supra*, 38 Cal.4th at pp. 573-574 [holding that the trial court had not abused its discretion in denying a motion for mistrial after a prosecution witness referred to the defendant's having recently been in prison, and the trial court admonished the jury as to the limited purpose for which the evidence was admitted].) We conclude the trial court did not abuse its discretion in denying the motion for mistrial.[5]

B. Admission of Evidence of Defendant's Possession of Marijuana Packaged for Sale

Defendant contends the trial court committed prejudicial error by admitting irrelevant and prejudicial evidence that defendant had marijuana packaged for sale in his possession when he was arrested.

1. Background

Defense counsel made a pretrial motion in limine to exclude evidence that marijuana had been found in defendant's clothing when he was arrested. Defense counsel argued that the evidence was irrelevant because defendant was not being charged with possession of marijuana, and the evidence was highly prejudicial under Evidence

[5] We also note, although the information was not before the trial court at the time it ruled on the motion for mistrial, that the probation report indicates defendant had been identified in juvenile probation records as an associate of the Bloods gang, had tattoos, and wore clothing consistent with that information. Moreover, the prosecutor stated he was prepared to allege gang enhancements if a new trial were granted.

Code section 352. The trial court concluded, however, that the evidence was relevant to explain defendant's motive for fleeing and for attempting to shoot Deputy Wood during the flight. The trial court determined that the evidence was more probative than prejudicial and therefore denied the motion to exclude the evidence.

During trial, Deputy Jarrod Burns testified that five or six baggies of marijuana had been discovered in the pocket of defendant's shorts. Burns stated it was his opinion that, based on his experience, the quantity of marijuana, and the way it was packaged, it was possessed for sale. In closing argument, the prosecutor referred to the marijuana as a motive for defendant's flight from Deputy Wood.

2. Standard of Review

"'A trial court's decision to admit or exclude evidence is reviewable for abuse of discretion.' [Citation.]" (*People v. Williams*, *supra*, 40 Cal.4th at p. 317.) "'In reviewing the ruling of the trial court, we reiterate the well-established principle that "the admissibility of this evidence has two components: (1) whether the challenged evidence satisfied the 'relevancy' requirement set forth in Evidence Code section 210, and (2) if the evidence was relevant, whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the [evidence] was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice." [Citation.]' [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1166.)

3. Analysis

a. Relevance

The trial court found that the evidence defendant was carrying marijuana packaged for sale was relevant to explain a possible motive for defendant's flight from Deputy Wood. Under Evidence Code section 210, relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," in other words, whether the evidence tends "'"logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.'" (*People v. Harris* (2005) 37 Cal.4th 310, 337.) All relevant evidence is admissible unless excluded under statute or the federal or state Constitution. (Evid. Code, § 351; Cal. Const., art. I, § 28, subd. (d).)

We agree with the trial court that the challenged evidence was relevant to the issue of defendant's motive in fleeing after the car in which he was a passenger was stopped by the deputies. The fact that defendant might have had additional motives for fleeing does not make the challenged evidence irrelevant.

b. Probability of undue prejudice

The trial court concluded the probative value of the challenged evidence outweighed the probability that admitting the evidence would cause undue prejudice. The fact that defendant possessed marijuana was relatively innocuous when compared to his conduct in shooting at Valencia and pointing a gun at Deputy Wood while fleeing. Moreover, in the context of the prosecution's entire case against defendant, the evidence of possession of marijuana was brief, and the trial court instructed the jury as to the

limited purpose for which the evidence was admitted. We conclude the trial court did not abuse its discretion in finding that the probative value of the evidence outweighed its prejudicial effect.

4. Harmless Error

The erroneous admission of evidence is evaluated under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Champion* (1995) 9 Cal.4th 879, 919, 923, disapproved on another point in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2 (conc. opn. of George, C. J., joined by a majority of the court.) Under this standard, even if the trial court erred in admitting the challenged evidence, such error would not require reversal because the evidence of defendant's guilt was overwhelming.

Defendant's description matched the description Valencia provided about the shooter, and Valencia identified defendant as the shooter from a six-pack photographic lineup two weeks after the shooting. He again later identified defendant as the shooter when he was shown photographs of the five individuals who had been in the car. Defendant fled from the police when the car in which he was a passenger was stopped. The gun defendant pointed at Deputy Wood during the flight had been used to fire the bullets recovered from Valencia's car. Defendant was given two GSR tests, both of which were positive.

Moreover, defense counsel did not dispute that defendant had resisted arrest, but argued he had not used force and violence in doing so. However, several deputies testified that defendant refused to show his hands when he was found hiding under a

bush. Defendant twisted to get away when Boyd tried to pull defendant's arm out from beneath him.

Finally, the fact that the jury acquitted defendant of charges of attempting to kill Deputy Wood shows that the jury carefully considered the evidence and did not find defendant guilty simply because he possessed marijuana for sale. We therefore conclude any error in the admission of the challenged evidence was harmless.

C. Instructions to the Jury on Resisting an Executive Officer

Defendant contends the trial court erred in failing to instruct the jury that resisting an executive officer, as defined in the first portion of section 69, is a specific intent crime.

1. Background

In counts 6 and 7, defendant was convicted of violating section 69, which makes it a crime to "attempt[], by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or [to] knowingly resist[], by the use of force or violence, such officer, in the performance of his duty . . . ." The trial court instructed the jury on the elements of the offenses charged in counts 6 and 7 with CALJIC No.7.50.[6]

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[6] The instruction provided, "Every person who willfully and unlawfully attempts by means of any threats or violence to deter or prevent an executive officer from performing any duty imposed upon that officer by law or who knowingly resists by the use of force or violence an executive officer in the performance of his or her duty is guilty of violation of Penal Code section 69, a crime. [¶] . . . In order to prove the crime, each of the following elements must be proved: [¶] One, a person knowingly and unlawfully resisted an executive officer in performance of his or her duties and; [¶] Two, the resistance . . . was accomplished by means of force or violence."

2. Forfeiture

The People argue that defendant has forfeited his claim of error because he did not request modifying, amplifying, or clarifying instructions in the trial court. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1711.) However, on appeal, a defendant may assert instructional error affecting a substantial right even if that error was not raised in the trial court (§ 1259; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103, fn. 34), and we will therefore examine the issue on the merits to determine if defendant's substantial rights were affected.

3. Analysis

Section 69 defines two offenses: (1) the *attempt* to deter or prevent an officer from performing a duty imposed on him by law, accomplished by threat or violence; and (2) *actual resistance* to an officer performing such duty, accomplished by force or violence. (*In re Manuel G.* (1997) 16 Cal.4th 805, 814; see also *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1530 ["These two offenses have different elements. Unlike resisting, the attempt to deter does not require the officer to be performing his duties at the time of the crime. The attempt may be intended to deter the officer's future performance of duties. [Citations.]"].) Defendant contends the instruction given the jury instead defined one offense as having two elements, and he cites *People v. Gutierrez* (2002) 28 Cal.4th 1083 (*Gutierrez*) for the proposition that the trial court should have instructed the jury on specific intent as an element of a violation of section 69. Although the court in *Gutierrez* found error in the trial court's failure to instruct the jury on specific intent, that case was tried solely on the theory of attempt. (*Id.* at p. 1153.)

The People concede that the trial court erred in failing to delete the language in the first paragraph of CALJIC No. 7.50 regarding the attempt crime. However, defendant was not tried under the theory of attempt, and in listing the actual elements of the offense charged, the court instructed the jury only on the second offense contained in section 69, i.e., resisting an officer in the performance of his duties by force or violence.

We conclude that any instructional error with respect to the elements of the violation of section 69 was harmless under either the *Watson* or *Chapman* standard of evaluating error. (*Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California* (1967) 386 U.S. 18, 24.) Sergeant Boyd testified he found defendant lying face down in the bushes. Although Sergeant Boyd repeatedly ordered defendant to show his hands, defendant kept his hands underneath his body. When Sergeant Boyd tried to grab defendant's arm out from underneath him, defendant twisted his body to get away from Sergeant Boyd's grasp and resisted Sergeant Boyd with his arms and legs. Sergeant Boyd was able to handcuff defendant with the help of three deputies. This evidence was overwhelming that defendant actually resisted the officers by force and that he had the specific intent to do so.

D. Failing to Instruct Jury on Section 148, Subdivision (a)(1)

Defendant contends the trial court erred in failing to instruct the jury sua sponte on a violation of section 148, subdivision (a)(1), misdemeanor nonforcible resisting arrest, as a lesser included offense to the charge of violating section 69.

"'A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citations.] This sua sponte obligation

extends to lesser included offenses if the evidence "raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense."' [Citation.] [¶] We employ two alternative tests to determine whether a lesser offense is necessarily included in a greater offense. Under the elements test, we look to see if all the legal elements of the lesser crime are included in the definition of the greater crime, such that the greater cannot be committed without committing the lesser. Under the accusatory pleading test, by contrast, we look not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime. [Citation.]" (*People v. Moon* (2005) 37 Cal.4th 1, 25-26.)

California courts have stated that under the statutory elements test misdemeanor nonforcible resisting arrest under section 148 is not a necessarily lesser included offense to resisting an executive officer under section 69. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 24-26, disagreed with on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1279-1280 [characterizing a violation of section 148 as a lesser related offense to a violation of section 69].) We agree with the reasoning and conclusion of those cases.

Defendant argues, however, that a violation of section 148 was a lesser included offense under the accusatory pleading test because counts 6 and 7 were charged in the conjunctive instead of the disjunctive. The court in *People v. Lopez* (2005) 129 Cal.App.4th 1508 rejected an identical argument in that case. The court explained, "When a crime can be committed in more than one way, it is standard practice to allege

in the conjunctive that it was committed every way. Such allegations do not require the prosecutor to prove that the defendant committed the crime in more than one way. [Citations.] We read the information to have charged defendant with violating section 69 in the statute's terms. . . . The statutory elements test is the only one relevant here." (*Id.* at pp. 1532-1533.) Thus, we conclude that a violation of section 148 was not a lesser included offense under the accusatory pleading test, and the trial court was not required to instruct the jury on nonforcible resisting arrest.

E. Denial of Motion to Release Juror Identifying Information

Defendant contends the trial court erred in denying his motion for release of the jurors' identifying information.

1. Background

Defendant moved before the sentencing hearing for release of personal juror identifying information. In support of the motion, he submitted the declarations of his trial counsel and of Juror No. 11.

In her declaration, Juror No. 11 stated that she and two other jurors had initially been undecided. The records of defendant's treatment for the gunshot wound to his chest had been introduced into evidence as exhibit No. 83. Another juror read those medical records to all the jurors, stated she was a nurse, and knew how to read such records. The records included information that defendant had tested positive for methamphetamine, cocaine, and marijuana. The two other previously undecided jurors then changed their votes to guilty; Juror No. 11's declaration stated they had done so "mainly because of the meth."

Juror No. 11 stated in her declaration that she felt pressured to vote guilty on counts 1 and 2 and that the nurse juror and another juror stated they would change their not guilty votes on the other attempted murder counts if she did not vote guilty. Juror No. 11 stated other jurors had told her she needed "to put these gang members in jail."

Defendant argued that Juror No. 11's declaration showed potential juror misconduct, including improper testimony of the nurse juror and improper use of that testimony to persuade other jurors to vote guilty; improper coercion; and bias based on the belief that defendant was a gang member.

The trial court denied the motion, finding the information in Juror No. 11's declaration was inadmissible because it was only speculation regarding other jurors' states of mind. The court noted that even though Juror No. 11 stated she had refused to take into account the information she believed to be improper, she had nonetheless voted guilty. The court found there were insufficient grounds for release of the information.

2. Analysis

In a criminal jury proceeding, the personal identification information of jurors "shall be sealed" unless the petitioner submits a declaration stating facts that establish good cause for the release of such information. (Code Civ. Proc., § 237, subds. (a)(2), (b).) If the defendant makes a prima showing of good cause, the trial court must set the matter for a hearing unless the record shows a compelling interest against disclosure. (*Ibid.*) Defendant contends the juror declaration submitted in support of his motion established good cause to release the jurors' identifying information to permit an investigation into juror misconduct.

However, under Evidence Code section 1150, subdivision (a), "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." We conclude that defendant failed to make a showing of potential juror misconduct on the basis of admissible evidence.

a. Reading defendant's medical records

Defendant appears to argue that the nurse juror committed misconduct in reading to other jurors the medical reports of defendant's treatment after he was shot in the chest. However, those reports were introduced into evidence, and one report states, "Urine drug screen positive for amphetamine, marijuana, and opiates." The fact that the juror who read those reports to the jury was a nurse could not have assisted the jury in understanding the clear and explicit statement in the medical record. It was not misconduct for the nurse juror to read those reports to the jury. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1265-1266.)

b. Jurors changing votes

Next, defendant complains that Juror No. 11 indicated two other jurors changed their votes based on the information in the medical reports. That conclusion is pure speculation and is inadmissible under Evidence Code section 1150, subdivision (a),

which "prohibits evidence showing the *effect* that statements or conduct had 'upon a juror either in influencing him to assent or to dissent from the verdict . . . .'" (*People v. Steele, supra*, 27 Cal.4th at p. 1265.)

c. Pressure to change vote

Third, Juror No. 11 stated in her declaration that other jurors had pressured her into changing her vote by threatening to change their own votes on other counts from not guilty to guilty. We conclude the declaration was inadmissible to show the effect the other jurors' statements might have had on the declarant. (See *People v. Burgener* (2003) 29 Cal.4th 833, 879 [juror's declaration that he perceived the trial court's admonition reminding the jury of their obligation to deliberate in good faith as a threat designed to coerce him to change his vote was inadmissible under Evidence Code section 1150 to impeach the verdict].)

d. Statement regarding putting gang members in jail

Finally, Juror No. 11 stated that other jurors had told her she needed to put "these gang members" in jail. Defendant contends this statement showed improper bias because the jurors had been instructed not to consider the testimony about defendant's gang membership for the purpose of establishing defendant's guilt. Like the other statements discussed above, this statement went to the other jurors' subjective thought processes and was inadmissible under Evidence Code section 1150 to impeach the verdict.

We therefore conclude that the trial court did not err in denying disclosure of jurors' personal identifying information.

F. Abstract of Judgment

Defendant contends, and the People agree, that the abstract of judgment must be corrected to reflect that defendant's sentence on count 2, assault with a firearm, and the firearm use enhancement connected to that count, were ordered stayed under section 654. We will order the abstract of judgment corrected accordingly.

IV. DISPOSITION

The trial court is directed to amend the abstract of judgment in accordance with this opinion and to forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

GAUT
J.

MILLER
J.